IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 272

CITY OF CHICAGO,

*Appellee,*

*vs.*

ARTHUR TERMINIELLO,

*Appellant.*

CERTIORARI TO SUPREME COURT OF ILLINOIS, THERE HEARD ON APPEAL FROM APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, ON APPEAL FROM MUNICIPAL COURT OF CHICAGO.

HONORABLE JOHN V. MCCORMICK, JUDGE PRESIDING.

PROSECUTION FOR VIOLATION OF DISORDERLY CONDUCT ORDINANCE.

## BRIEF AND ARGUMENT FOR APPELLEE.


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## BRIEF AND ARGUMENT FOR APPELLEE.

## PRELIMINARY STATEMENT.

A jury in the Municipal Court of Chicago found the defendant, Arthur Terminiello, guilty of the offense of disorderly conduct in violation of Chapter 193, par. 1 (1) of the Revised Code of 1939, as amended. That ordinance, in so far as is here pertinent, provides as follows:

> "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of peace or diversion tending to a breach of the peace, within the limits of the city * * * shall be

deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than One Dollar nor more than Two Hundred Dollars for each offense."

The sworn complaint charged that on the 7th day of February, 1946, he did make, or aid in making, an improper noise, riot, disturbance, breach of peace or diversion tending to a breach of the peace within the limits of the city. The Appellate Court of Illinois, First District, reviewed the evidence in detail and affirmed the judgment (332 Ill. App. 17). The Supreme Court of Illinois affirmed the judgment of the Appellate Court (400 Ill. 23).

The opinions of the Supreme and Appellate Courts of Illinois set forth in considerable detail the factual situation which existed at the time defendant made the speech which forms the background for this prosecution. They also set forth excerpts from the speech which support their conclusion that he was guilty of disorderly conduct in violation of the ordinance. Both courts found that the meeting at which defendant spoke was a public meeting.

The opinion of the Supreme Court, whose decision is here on appeal, finds that, "a breach of the peace occurs whenever there is a violation of the public peace and order and it is immaterial whether the violation originates in a private place or on public property" within the ordinance prescribing a penalty for "breach of the peace, or diversion tending to a breach of the peace within the limits of the city". (400 Ill. 30). It further finds (p. 31) "that Terminiello's conduct and words resulted in actual breaches of the peace both without and within the auditorium. Likewise, his actions amounted to a diversion tending to a breach of the peace." * * * (p. 32) "The meeting was, indeed, a diversion tending to a breach of the peace."

The opinion also points out (p. 32) that the "defendant

opened his remarks by addressing the minority present as 'scum' and asserting that 'Nothing I could say tonight could begin to express the contempt I have for the slimy scum that got in by mistake.'" These epithets alone, the court held (p. 32), "directed to certain members of the audience, constituted action tending to a breach of the peace." And, after an analysis of the speech, the court held (p. 33) that "In this manner was defendant guilty of a diversion tending to a breach of the peace by his wild, intemperate and inflammatory utterances. His speech tended to incite the majority of his audience to immediate violence against the angry mob outside."

## The Contested Issue.

It is the contention of the defendant that the judgment against him violates his right of free speech and free assembly under the First and Fourteenth Amendments to the Constitution of the United States and under the 4th section of Article II of the Constitution of the State of Illinois. His claim under the Constitution of the State of Illinois has been disposed of by the judgment of the Supreme Court of Illinois (400 Ill. 23). The question of whether the defendant's speech was made in a public or private place has been specifically eliminated from the case by his admission in the brief (p. 16). The only question before this court is whether his rights under the First and Fourteenth Amendments of the Constitution of the United States have been infringed.

## POINTS AND AUTHORITIES.

### I.

**The constitutional guarantee of free speech does not prevent the punishment for slanderous, abusive and offensive utterances which have a tendency to breach the peace.**

*Stromberg* v. *California*, 283 U. S. 359, 368;
*Near* v. *Minnesota*, 283 U. S. 697, 708, 711, 712 (distinguished);
*Thornhill* v. *Alabama*, 310 U. S. 88;
*Ogren* v. *Rockford Star Printing Co.*, 288 Ill. 405, 417;
*Murdock* v. *Pennsylvania*, 319 U. S. 105 (distinguished);
*Thomas* v. *Collins*, 323 U. S. 516 (distinguished);
*Cantwell* v. *Connecticut*, 310 U. S. 296, 308;
*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571;
*City of Chicago* v. *Hunt*, 374 Ill. 234.

### II.

**The slanderous, offensive, abusive and insulting utterances of the defendant tended to breach the public peace and actually resulted in a number of public disturbances.**

*People* v. *Spielman*, 318 Ill. 482, 489;
*State* v. *O'Donnell*, 300 Atl. 739, 741;
*Webster's New International Dictionary*;
8 American Jurisprudence, p. 834, sec. 3; p. 837;
*State* v. *Klapprott*, 127 N. J. L. 395, 22 Atl. (2d) 877;
*Johnson* v. *State*, (Texas Cr. App.) 66 S. W. 1097;
"*Democracy Reborn*," by Russell Lord (Reynal & Hitchcock, Inc., 1944).

## ARGUMENT.

### I.

**The constitutional guarantee of free speech does not prevent the punishment for slanderous, abusive and offensive utterances which have a tendency to breach the peace.**

Inherently the defendant's misplaced reliance upon the constitutional provisions guaranteeing the right to freedom of speech proceeds (1) upon the misapprehension that slanderous utterances are sheltered by the guarantee of free speech, (2) upon the failure to recognize that the words "scum" and "slimy scum" are insulting or "fighting" words and (3) upon the inability to appreciate the distinction between "previous restraint", as that concept is defined by the United States Supreme Court, and subsequent punishment for a past abuse of the right of free speech. An analysis of the cases relied upon by defendant will disclose that they completely and emphatically support the judgment in this case.

The key to the problem is succinctly contained in Section 4 of Article II of the Illinois Constitution:

> "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."

The significance of the foregoing provision completely escapes defendant. While it is true that it is a legal impossibility to restrain in advance any utterance, no matter how vicious and reprehensible it may be, a person cannot escape *responsibility and punishment* for utterances which the state has the power to punish in the interests of a well ordered society. It is well settled, and it is conceded by

defendant, that the right of free speech is not absolute and that it must give way in certain instances to the paramount right of society to protect itself from utterances that disturb its peace and tranquility. The issue in this case is whether the defendant has transgressed the bounds of permissible speech. The Supreme Court of Illinois, the Appellate Court and a jury have held that he has. The only other question to consider is whether the authorities relied on by him hold that the Constitution offers him immunity from punishment. It is abundantly clear that they do not.

On page 21 of the petition is cited *Stromberg* v. *California*, 283 U. S. 359, where, at page 368, the court said:

> "There is no question but that the State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime * * *"

The assertion is made (Br. 27) that there is nothing in defendant's utterances which incite to violence and crime and that there was nothing personal in anything he said. His assertion overlooks the steady stream of slander that he poured indiscriminately upon so many objects of his venom and the words "scum" and "slimy scum" which stand judicially established as words of strong opprobrium and as violence-inciting language. He overlooks in particular the wild tales of alleged mayhem which actually provoked his audience to cries advocating murder, mayhem and sterilization of the objects of his defamatory statements.

Even the dissenting opinion in the Appellate Court, upon which petitioner relies so heavily, states as follows (R. 26):

> "The terms 'scum,' 'slimy scum,' and 'skunks of Jews' are epithets, abusive and insulting terms. They are not in any proper sense communication of information or opinion safeguarded by the constitution."

The decision in *Near* v. *Minnesota*, 283 U. S. 697 (discussed by defendant on page 30 of his petition), is simply not understood by him. In that case an injunction was sought, pursuant to statute, to restrain a newspaper from publishing malicious, scandalous or defamatory matter. The court reiterated that (page 708):

> "Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse."

But the court pointed out (page 711):

> "The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical."

The further effect of the statute is thus described (page 712):

> "The statute not only operates to suppress the offending newspaper or periodical but to put the publisher under an effective censorship. When a newspaper or periodical is found to be 'malicious, scandalous and defamatory,' and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment."

*Near* v. *Minnesota* presents the clearest possible kind of previous restraint. The case at bar on the contrary presents an attempt to punish in the ordinary sense for past utterances and no attempt is made to restrain, by injunction or otherwise, future utterances of the defendant. Should they, when actually made, be contrary to the public peace, they may then be punished after due conviction by the regular judicial process. This ~~prospect~~ may and should act as a deterrent, but that is not regarded as a previous restraint in the sense defined by *Near* v. *Minnesota*. The defendant's suggestion that it constitutes a previous restraint because it will restrain him from future like offenses is ludicrous. That is the very purpose of libel laws—to deter. Because previous restraint is not permissible, punishment

after the fact is provided with a view to *deter the offenders and others* from like practices. It is the universally accepted justification for punishment of crime of every sort.

The defendant can derive no comfort from *Thornhill* v. *Alabama*, 310 U. S. 88, where the court invalidated a state act which prohibited *all* picketing. The court held the statute was too broad because (page 104):

> "The range of activities proscribed by Sec. 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute."

The court in the case just cited affirms the power of the state to prohibit acts which tend to breach the public peace. (Page 105.) The ordinance herein involved is narrowly framed to prohibit not all acts and utterances but only such acts and utterances as tend to a breach of the peace. The facts in the case at bar call only for a narrow construction that slanderous and personally abusive epithets are prohibited because they clearly tend to breach the public peace.

Defendant expresses alarm (Br., p. 24) over a "perverted, illegal" use of the ordinance as a threat to the two party system. We cannot believe that the two party system rests upon such tenuous ground as the asserted right to slander persons and groups and to engage in wanton, abusive, insulting epithets and fantastic tales that whip audiences into such frenzy that they demand the murder, crippling and sterilization of the objects of the speaker's slanderous utterances. Even in the political arena, defamation of a candidate is punishable by the State. (*Ogren* v. *Rockford Star Printing Co.*, 288 Ill. 405, 417.)

It is complained (Brief, p. 24) that the effect of this conviction would enable rival political parties to bring about

the arrest of opponents because of offensive sentiments expressed at a political rally. This is based on the language in the opinion (400 Ill. 32) which holds that the meeting itself was a diversion tending to a breach of the peace. It should be noted that the Appellate Court condemned the demonstration outside the hall (R. 17) and the city has at no time condoned the actions of the mob. The finding of the Supreme Court that the meeting itself was a breach of the peace seems to be amply justified by the evidence but even if the finding goes too far, the decision is sustainable on the basis of the use of the epithets "scum" and "slimy scum" and on those portions of the speech which clearly constitute an incitement to violence.

*Murdock v. Pennsylvania*, 319 U. S. 105, discussed by defendant on pages 27-29 of his petition, is clearly distinguishable from the case at bar. In that case the issue of previous restraint was involved. The ordinance under attack imposed a license fee upon canvassing and soliciting. The ordinance was construed to embrace the activities of the religious sect, Jehovah's Witnesses. The court held that the state authorities were powerless to require a license as a prerequisite to the exercise of the privilege of freedom of speech and religion. But the court significantly observed (p. 116):

> "Jehovah's Witnesses are not 'above the law.' But the present ordinance is not directed to the problems with which the police power of the state is free to deal. It does not cover, and petitioners are not charged with, breaches of the peace. They are pursuing their solicitations peacefully and quietly. Petitioners, moreover, are not charged with or prosecuted for the use of language which is obscene, abusive, or which incites retaliation."

The applicability of the foregoing quotation to the case at bar and its support for the ordinance involved and the

charge of its violation are clear. The defendant protests that the city seeks to impute to his utterances abusive and objectionable matter it does not contain. Reasonable minds cannot possibly disagree that the utterances complained of were abusive and objectionable in the extreme. The jury found it to be so, and the Appellate Court has, by affirming the judgment, rendered their finding conclusive. The Supreme Court of Illinois has recognized the binding effect of this finding (400 Ill. 29). The threat to public peace was clear as evidenced by the reactions of the audience. The defendant quibbles about the statement "non-Christian doctors" and "non-Christian nurses" as possibly not meaning Jews. When the defendant was speaking of "non-Christians" "all of one race" (R. 74) who were in the armed forces of the country, no one could doubt whom he intended to accuse. Considering the tenor of his speech, there is no question that he meant Jews. He himself said, "I meant the Jews and others". (R. 117.) His assertion that "others" meant "Mohammedans" in the armed forces of our country is, of course, ridiculous. (R. 118.)

*Thomas* v. *Collins*, 323 U. S. 516, like *Near* v. *Minnesota*, and *Murdock* v. *Pennsylvania*, involved a question of previous restraint inherent in a state statute that required labor organizers to apply for an organizer's card. For the first time, after reading this decision, the defendant seems to have acquired a measure of understanding of the concept of "previous restraint" because he states (page 34 of his petition): "There was of course no 'previous restraint' so far as appellant's speech of February 7, 1946, was concerned * * *." The constitution is thus satisfied because it does not concern itself with the deterrent effect of prospective punishment for acts or utterances violating state law operating within its legitimate sphere guarding the public peace. The constitution is content to let

the courts and juries determine whether punishment should be meted out *after* the acts have been committed or the utterances expressed.

The remaining case cited by defendant (Br. 35), *Cantwell v. Connecticut*, 310 U. S. 296, involving charges that the defendant breached the peace, approaches most closely upon the issue in the present case. A thorough understanding of the reasons which led the court to hold the defendant guilty will impel the affirmance of the judgment in this case.

In the *Cantwell* case, 310 U. S. 296, the court summarizes the law relating to breaches of the peace and defines the power of the state to prevent them (p. 308):

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but *acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect.*" (Italics ours.)

The court pointed out that Cantwell was conducting himself in a peaceful manner. "There is no showing that his deportment was noisy, truculent, overbearing or offensive. He requested of two pedestrians permission to play to them a phonograph record. The permission was granted. *It is not claimed that he intended to insult or affront the hearers by playing the record.* It is plain that he wished only to interest them in his propaganda. The sound of the phonograph is not shown to have disturbed residents of the street; to have drawn a crowd, or to have impeded traffic." (Pages 308-9. Italics ours.)

In the case at bar, the defendant intended to and did defame many absent persons as well as groups of persons

embracing members of his audience and deliberately insulted some of his hearers by calling them "scum" and "slimy scum." In fact his only regret seems to be that his vocabulary did not at the moment provide him with more offensive words with which to express his contempt. (R. 68.)

That the court in the *Cantwell* case would regard the utterances of the petitioner herein as punishable is clear from the following (page 309):

> "Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of peace. One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent *or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.*" (Italics ours.)

And finally, the right of the State to punish utterances tending to breach the peace is made crystal clear by the court (page 310):

> "There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish."

The foregoing language is so appropriate to the case at bar that the court might well have been characterizing the

utterances of the defendant herein. The manifest purpose of his words assuredly originated in the "delusion of racial or religious conceit" and they clearly were such as to "incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties."

The defendant relies (Br., p. 35) upon the language of the court in the *Cantwell* case, that "in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question." In view of the entire opinion his hope that this language gives him immunity is forlorn. The court manifestly recognized the right of the State to punish the common law offense of breach of the peace *as that offense has been traditionally understood*. With regard to verbal acts the common law offense means libelous, obscene or profane words or abusive epithets. If the State intends to go beyond the traditional definition and bring other acts within its scope, such as playing phonographs on the public streets, then it can do so only by means of a statute narrowly drawn to define and punish specific acts. There is no necessity for, and the court clearly cannot have intended to say and did not say that a narrowly drawn statute must be present to punish those who resort to libel and epithets. Their punishment even in the absence of statute has been recognized for too long a time to admit of any doubt on that score.

Our interpretation of this portion of the opinion is thoroughly justified by the later case of *Chaplinsky v. New Hampshire*, 315 U. S. 568, wherein the court said (571):

> "There are certain *well-defined* and *narrowly limited* classes of speech, the prevention and punishment

of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, *the libelous, and the insulting or 'fighting words'*—those which by their very utterances inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (Italics ours.)

It should be noted that the statute in the *Chaplinsky* case was couched in broad language (315 U. S. 569). It prohibited any person from addressing "any offensive, derisive or annoying word" to any other person in a public place. The state court narrowly construed the statute as being designed to preserve the public peace and therefore no words were "forbidden except such as have a direct tendency to cause acts of violence by the person to whom individually, the remark is addressed." (315 U. S. 573)

The state court further interpreted the statute (315 U. S. 573):

> "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. The statute as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including 'classical fighting words,' words in

current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."

The ordinance should be construed in a way that will render it free from constitutional objection. The ordinance in question was construed in *City of Chicago* v. *Hunt*, 374 Ill. 234. In answer to the charge that it was indefinite and uncertain the Supreme Court of Illinois held that a legislative body may use words having a common law meaning. When the city council used the words "breach of the peace" those words must be understood in the light of the common law. So far as verbal acts are concerned the ordinance has in mind and prohibits (in the language of the Supreme Court of the United States) "well-defined and narrowly limited classes of speech, the prevention and the punishment of which have never been thought to raise any Constitutional problem" "the lewd and obscene, the profane, the *libelous, and the insulting or fighting words.*" (315 U. S. 571-2:) (Italics ours.)

Thus construed, and that is the construction we urge, there can be no constitutional objection to the ordinance. Nor can there be any doubt concerning its violation by defendant.

Defendant apparently fails to see any slanderous, insulting or fighting words in the speech. We venture to say that the average person would not share this placid reaction to "scum" and "slimy scum." Those words rank high in the list of "classical fighting words." Nor would the average person share with him the naive view that his talk was not slanderous when it overflowed with charges of sedition, official corruption, lack of judicial integrity and a multitude of other offenses climaxed by an accusation of crimes as hideous as the mind of man could conceive—amputation of limbs and injection of syphilis and other disease germs.

The ordinary prosecution of disorderly conduct relates to acts or utterances originating in spontaneous loss of temper or the use of opprobrious language by persons who have little education or breeding and know no better. The tranquility of the public is disturbed for the moment and tranquility reigns again. This case does not present the ordinary situation. This breach of the peace is set in a background of deliberate hate and malice spread by one who has so conducted himself that the Church, which once offered him the loftiest of offices—a priesthood,—was forced to suspend him. (R. 115.) His utterances have been described by his own counsel in his brief in the Supreme Court of Illinois (p. 30) as "disjointed and disconnected" but "nevertheless, the exposition of ideas is there." If there be any exposition of ideas, it is composed of a theme of hate and fear. These disconnected and disjointed utterances had only one deliberate purpose—to excite the audience to an uncontrollable fever of emotion by pumping them full of hatred and fear. The tranquility is disturbed not only for the moment but the hatred and fear take root and grow long after the incident is over.

The defendant started with invective against certain members of the audience (R. 68). He expressed fear that freedom of speech was being undermined (R. 68). He talked about intimidation (R. 68). He spoke about impending destruction of America by revolution. He preached hatred of Russia, charging murder of fifteen million people (R. 70). He preached hatred of the New Deal, implying it fostered Communism (R. 70). He charged Mrs. Roosevelt with being a Communist (R. 71). He maligned the motives of Henry A. Wallace in trying to provide jobs (R. 71). He urged mistrust of Chief Justice Stone (R. 71). He charged a conspiracy to pervert the F.B.I. (R. 71). He charged Washington officials with bribing South American officials (R. 72). He charged

Morgenthau with a plan to starve babies and pregnant women in Germany (R. 73). He charged certain non-Christian doctors and nurses, "all of one race", with mayhem and injection of syphilis and disease germs (R. 74). He preached contempt for England (R. 75). He preached hatred of the Jews (R. 75-77). He instilled fear of vaguely defined enemies (R. 77). He instilled fear of the Jews (R. 79).

The portions of the speech set forth in the opinions of the Supreme Court of Illinois and the Appellate Court, even without a reading of the entire speech, make it manifest that his utterances were clearly calculated to disturb the public peace and tranquility. Utterances such as these set the stage for and resulted in the extermination of millions of persons in Europe. The favorite device of aggressor countries was the pretext that they were in danger of persecution and hence were required to take drastic action in self-protection.

We have already shown that the defendant stepped beyond the bounds of permissible speech in a number of instances. In view of the background against which these transgressions of free speech occurred, there is small wonder that the jury found him guilty, and that the Appellate Court and the Illinois Supreme Court affirmed the judgment.

The Appellate Court and the Illinois Supreme Court did more than merely affirm the verdict of the jury and the judgment of the court. They affirmed in such ringing terms that persons like the defendant who seem unable to distinguish between what is offensive and slanderous and what is innocent are given clearly to understand the limits of constitutionally guaranteed speech. The opinion of the court makes it clear that free speech does not mean talk

which incites to violence. Defamatory and abusive utterances have no place in the orderly exposition of ideas. While it is true that persons are guaranteed the right to express thoughts which may be unpopular, they do not have the right to express themselves in language which is inherently abusive or constitutes incitement to breach of the peace. This mode of expression should be condemned in emphatic terms so that the peace and good order of the City of Chicago and the State at large will be permanently protected. This case calls for a reaffirmation of the vigorous language of this court in *Cantwell* v. *Connecticut*, 310 U. S. 296, where this court said:

> "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot * * *."

## II.

**The slanderous, offensive, abusive and insulting utterances of the defendant tended to breach the public peace and actually resulted in a number of public disturbances.**

While plaintiff is of the opinion that our first point has effectively demonstrated that the appeal of the defendant should be rejected on the constitutional grounds discussed, we deem it not inappropriate to point out that the Supreme Court of Illinois and the Appellate Court were entirely justified in affirming the Municipal Court of Chicago on all points.

The authorities clearly and convincingly establish that the conviction was correctly sustained on the ground that the utterances of the defendant constitute a diversion tending to a breach of the peace even in normal times and under ordinary conditions. But the courts will take judicial notice that these are not normal times and the record discloses

that the conditions attending the defendant's acts were not ordinary. Under these circumstances the defendant's offense assumes a magnitude far greater than the petty charge of disorderly conduct ordinarily connotes. The times and conditions being what they are the defendant's conduct strikes at the very foundation of public tranquility.

We have just concluded the most catastrophic war in history. During its progress the one prayer on the lips of every decent American, in fact of every liberty loving person the world over, was for unity of the American people. Before we entered the war, and during its progress, we were plagued by a small minority who were not only sympathetic to the enemy, but through confederation or otherwise labored assiduously to aid him. The methods used were precisely those employed by the mad prophet of the enemy—the stirring up of fear of and hatred for the administration and selected groups of citizens. Their manifest purpose here was to divide our citizenry, weaken our morale and divert our minds from concentrating upon the real danger which confronted us from the fiend who ruled the chief enemy country. To them the arrogant and brutal aggressors were not the enemy. To them the New Deal, the international bankers, etc., etc., were the enemies.

This Court is not unaware of the extent to which emotions were aroused and passions stirred by the propaganda of those who advocated American disunity by preaching racism. Time for the cooling of passions had not passed when the meeting was called by Gerald L. K. Smith in the very center of one of the most cosmopolitan cities in the world, and in his invitation calls upon the people to come and hear "the Father Coughlin of the South" and states that "I wish it were possible for me to preside over a meeting where I could introduce Father Charles E. Coughlin [whom the church was compelled to silence because of his sub-

versive, abusive and hate engendering speeches]. Unable to do this as yet, I consider that Father Terminiello is the best, if not the only substitute that can be found in the United States." We respectfully ask this Honorable Court: What greater incitement to disturbance of the peace of a great community could be conceived of by the most diabolically ingenious mind than a meeting so staged and so heralded? The provocative character of the act of calling the meeting was a matter of common knowledge which is significantly evidenced by the fact that the police were stationed inside and outside the Auditorium to quell any breach of the peace that might ensue.

This being the explosive background against which the offense of the defendant was committed, the affirmance of the conviction by the Appellate Court and the Supreme Court of Illinois stands on unshakable ground. We concede that the meeting could not be legally stopped, nor could the defendant be prevented from making his speech because that would constitute a previous restraint, but democratic government would decay and fall if it were not strong enough to check such depredations by punishing those who have perpetrated them.

In our own day and generation, in another country, such hate-mongering produced the most hideous catastrophe known to history. While we have no fear that America's purveyors of hate will stir up this country to the same madness as did their exemplars in Germany, it is not beyond the realm of probability that disastrous race riots may result. Must the authorities wait until some one is murdered as a result of this diabolical conspiracy against the peace of our country before they can take action to punish the conspirators?

The defendant urged his innocence of the offense of a breach of the peace or a diversion tending to a breach of

the peace upon the two-fold ground that his utterances were not such as to provoke a disturbance and that the utterances could not legally create a public disturbance because they were made at an alleged private meeting. The Supreme Court of Illinois has held that neither ground has the slightest merit.

The defendant was charged with committing a breach of the peace and that he did make or aid in making an improper noise or diversion tending to a breach of the peace (R. 53). Webster's New International Dictionary (Second Edition) defines "diversion" as "an act of turning a person from an occupation or purpose." Simply stated, therefore, the defendant was charged with an act which tends to turn persons from their orderly occupations or purposes and incites them to breach the peace.

Concerning the definition of a breach of the peace there cannot be any dispute. It is a "violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence or tending to provoke or excite others to break the peace, or, as sometimes said, it includes any violation of any law enacted to preserve peace and good order." (8 American Jurisprudence, page 834, section 3.) It is well settled that the use of opprobrious, abusive, insulting, or profane language may amount to a breach of the peace. (8 American Jurisprudence, page 837.)

The excerpts from the defendant's talk set forth in the opinions of the Appellate Court (R. 8-15) and of the Supreme Court of Illinois (R. 138-9) are ample to convince any but the most irrational mind that the inevitable consequence of defendant's utterances was to disturb the peace and tranquility of everyone who heard them. (The speech appears at page 68 of the transcript.) Wild and fantastic stories of mayhem, rape, official corruption, sedition, revolution and other offenses followed each other in rapid and

incoherent succession. The utterances of the defendant were all calculated to instill fear in the audience against vague, undefined alleged enemies of all Christians (R. 78). The defendant deliberately intended to instill fear in those of his audience who were believed to share his philosophy of pitting race against race so that they would contribute to the cost of the activities of the organization sponsoring the meeting, which organization was represented to be the protector of the Christians against the alleged machinations of the non-Christians. The inevitable consequence of the utterances was also to instill fear in the minds of the Jews who were present in the audience—fear that the emotions and passions of the audience would be aroused to such a pitch that violence against their persons would ensue.

The libelous character of the defendant's utterances were of the most aggravated nature and covered a wide range. Individuals, public officials, professional people, religious groups and whole nations were defamed and reviled by the defendant. Mrs. Roosevelt is charged with being a Communist (R. 71). The integrity of Henry A. Wallace in seeking to provide 60,000,000 jobs is impugned (R. 71). The lack of integrity of Chief Justice Stone based upon his alleged disrespect for constitutional guarantees is charged (R. 71). A plot to undermine the FBI is alleged (R. 71). Bribery of South American officials by American officials is asserted (R. 72). Morgenthau is accused of a plan to starve little babies and pregnant women in Germany. (R. 73). Jewish doctors and nurses are accused of the most gruesome of crimes, mayhem and the injection of syphilis and and other disease germs (R. 74).

It is difficult to imagine utterances which are more calculated to make the hearer's blood boil with indignation. It requires only the possession of a rational mind to understand that the vicious libels spouted by the defendant in

the presence of a mixed audience composed of persons who shared the speaker's views and philosophy and those who disagreed with them must inevitably result in a breach of the peace. The clearest proof of this is the fact that breaches of the peace actually occurred.

Since the verdict of the jury was in favor of the plaintiff, and the judgment has been affirmed by the Appellate Court, the testimony in the case must be taken in a light most favorable to the plaintiff. It must be accepted that the jury believed the plaintiff's witnesses and refused to believe the defendant's witnesses where the testimony was in conflict. Mrs. Lipman testified that one of the audience stated, "Yes, the Jews are all killers, murderers. If we don't kill them first, they will kill us" (R. 58). Latimer testified that the audience expressed anger and that one of the audience said that the "Jews and niggers and Catholics would have to be gotten rid of" (R. 64). There were howls, hoots, cries and shouts at various points in the defendant's speech (R. 64). The audience was disturbed and angry (R. 64). Karel testified that everybody started to holler "Yes, send the Jews back to Russia. Kill the Jews" and that several women in the audience hollered "they ought to do that to the Jews, they ought to cripple them" (R. 80); and further, that the audience said "they ought to starve the Jews," "they ought to kill Morgenthau" (R. 84). Immediately after the narration by the defendant of the tale that "non-Christian" doctors had committed mayhem someone in the audience reminded the speaker of "the plan to sterilize them" (R. 118). The reactions of the audience were the expected and inevitable consequences of the defendant's inflammatory words. That is the reason why the law condemns and punishes incitement to crime.

In *People* v. *Spielman*, 318 Ill. 482 the defendant had published an editorial charging members of the American Le-

gion with indolence and attempts to obtain their livelihood by criminal means and accused them of crime, venality and lawlessness. In upholding the conviction of the defendant on a charge of criminal libel the court said, (page 489):

> "Criminal liability for libels rests upon their tendency to provoke breaches of the peace. [Citing Authorities]. The libel need not be on a particular person. It may be upon a family, class, corporation or other body. [Citing Authorities]. *A libel upon a class or group has as great a tendency to provoke a breach of the peace or to disturb society as has a libel on an individual*, and such a libel is punishable even though its application to individual members of the class or group cannot be proved." (Italics ours.)

It is submitted that the utterances of the defendant fairly reek with statements of a most reprehensible nature which the jury was thoroughly justified in finding tended to breach the public peace. The defendant's conception of the meeting as calm and orderly when the audience had been aroused by the defendant's slanderous utterances to react with shouts calling for murder and mayhem discloses an amazing inability to understand the meaning of peace and tranquility.

The defendant did not confine himself to maligning absentee individuals and groups. He resorted to personal abuse directed to certain members of the audience. In doing so he employed epithets which fall squarely within judicial condemnation as constituting action tending to breach the peace. In *State v. O'Donnell*, 209 Atl. 739 the defendant was convicted of disorderly conduct. His conduct consisted in the utterance of the following language:

> "Mr. Tuso is a damn rat and scum of the earth. Judge Loder is like Tommy Tuso, the scum of the earth and a damn rat, good for nothing, the burrough police are a bunch of damn rats; they are the cause of all this trouble."

The attorneys for the defendant in that case shared the amazing philosophy of the defendant in this case and saw nothing offensive in the above quoted language. The Supreme Court of New Jersey, however, was of a contrary opinion. It said, page 741:

> "With respect to the ordinary meaning of 'rat' and 'scum of the earth' when used as epithets, it is a matter of common knowledge that they are expressions of strong opprobrium. They imply baseness of character and vileness of mind, emotions and intentions. They are selected when one intends to be offensive. * * * 'Scum' [is defined] as 'refuse, off-scourings, anything vile or worthless, hence, vile or worthless persons; low people.' I am of the opinion that such epithets are clearly offensive."

Counsel for defendant in the above case again paralleling the philosophy of defendant in the instant case urged that the constitutional guarantee of free speech offered the defendant immunity from prosecution for his offensive utterances. The court emphatically rejected this contention. The decision of the New Jersey court on the issue of free speech should be given extraordinary weight because it was rendered by a court that had a keen appreciation of the scope of the constitutional guarantee. This is forcefully demonstrated by the later case of *State* v. *Klapprott*, 127 N. J. L. 395, 22 Atl. (2d) 877 wherein the same court struck down, on grounds of indefiniteness and undue breadth, a statute directed against statements inciting, promoting or advocating hatred, abuse, violence or hostility against any group of persons in the state by reason of race, color, religion, or manner of worship.

It is therefore abundantly clear that a case of disorderly conduct against the defendant herein is established aside from all other considerations by his use of the words "scum" and "slimy scum" (R. 68). The defendant re-

marked that "nothing I could say tonight could begin to express the contempt I have for the slimy scum that got in by mistake." It is apparent that the defendant underrated his linguistic ability to express his contempt because he could not have selected more powerful words to accomplish his purpose of giving offense. The New Jersey court in the quotation above given has defined the word "scum". The defendant, fearful that "'scum" was not offensive enough, superimposed the additional opprobrious epithet "slimy" which is defined by Webster as "vile; offensive; vulgar; highly contemptuous." Considering the explosive setting in which these words were uttered they acquired even greater force as potential disturbers of the peace.

The defendant himself confesses that this was an intemperate remark, (R. 146), and apparently realizes that he should not have made it. It is furthermore clear that the defendant deliberately addressed these remarks to persons in the audience, as is evidenced by his remark that they "got in by mistake." Accordingly, even if the defendant had not thereafter embarked upon this theme of vilification, achieving new heights of provocation, the conviction in this case would be well grounded.

The utterances of the defendant resulted in still another breach of the peace. Karel testified that he heard someone get up and say "You are a God damned liar." (R. 82.) The defendant's witness Mrs. Dilling testified that while the defendant was speaking a man in the back of the hall got up and said "You are a God damned liar" and was ushered out by the police. (R. 97.) It has been held that the utterance of the above quoted epithet amounts to a breach of the peace. *Johnson v. State* (Texas Criminal Appeals) 66 S. W. 1097. It is therefore established by the defendant's own witness that a breach of the peace occurred during the defendant's talk. There can be no question that the de-

fendant's utterances provoked this breach of the peace and that therefore upon this incident alone the conviction that he was guilty of a diversion tending to a breach of the peace is proper.

The defendant did not hesitate to stoop to a vicious distortion of Henry Wallace's remarks. He quoted Wallace as follows (R. 71):

> "Here he is, what he says about revolution: 'We are in for a profound revolution. Those of us who realize the inevitableness of the revolution, and are anxious that it be gradual and bloodless instead of somewhat bloody. Of course, if necessary, we will have it more bloody.'"

The address from which defendant purports to quote appears in a volume entitled "Democracy Reborn", which contains selections from public papers of Henry A. Wallace, by Russell Lord, published by Reynal & Hitchcock, Inc., copyright 1944, pp. 38-39. Mr. Wallace said:

> "*We are in for a profound revolution*, partly as a result of the aftermath of two great wars and partly as a result of 150 years of modern technology and democratic thinking about the rights and duties of man. *Those of us who realize the inevitability of revolution are anxious that it be gradual and bloodless instead of sudden and bloody.* We believe it can be gradual and bloodless if the makers of public opinion, if the politicians, if the pressure-group leaders will only influence their millions of followers on behalf of the public good instead of regional and class prejudices. It would be simple if light could come down from heaven, but we all know that God helps those who help themselves. The people themselves will have to educate their leaders on behalf of the general welfare, measuring every article in the press, every statement over the radio, every act of Congress by the one yardstick: 'Does this help use all our resources, employ all our men, develop all our skills?' If the people everywhere hold these judgments up as a measure, we shall gradually find this principle of 'goodness' permeating our national life like a

> heaven. In no other climate can there be profits for our private-enterprise economy. We must fight with all our might to do this thing. *Otherwise we shall have a bloody revolution and slavery.* Time is pressing. Victory will bring problems on us so thick and fast that we must be prepared to make instant and correct decisions."

We have italicized the portions of Mr. Wallace's address which the defendant in his speech (R. 71) purported to quote. The court will note how little the defendant actually quoted from Mr. Wallace, how he lifted a few words and a sentence from the context to express a meaning far removed from that which was expressed by Mr. Wallace. We call the court's attention particularly to the quotation by defendant attributed to Mr. Wallace when defendant said: "Of course, if necessary, we will have it more bloody". The closest to which this statement of defendant's approximates is the last italicized sentence where Mr. Wallace said: "Otherwise we shall have a bloody revolution and slavery". This statement followed Mr. Wallace's pronouncement that revolution can be gradual and bloodless if the makers of public opinion, if the politicians, if the pressure-group leaders will only influence their millions of followers on behalf of the public good instead of regional and class prejudices. Mr. Wallace's speech was far removed from the hate-mongering speech of the defendant and the language lifted by the defendant in the purported quotation conveys a meaning which in no way resembles that given to it by Mr. Wallace.

It is understandable why the Supreme Court of Illinois characterized defendant's remarks as double-talk (400 Ill. 33).

It is also understandable why the Appellate Court (R. 15), after referring to this portion of defendant's speech, said:

"If these statements, coupled with the rest of his speech, are not an appeal to fury and an incitement to disorder and violence, then these words lose their English meaning."

When we consider the circumstances attending the meeting at which the defendant spoke, his utterances appear reprehensible in the extreme. Outside the hall a large number of people had formed a picket line to protest the utterances which they anticipated would be forthcoming at the meeting. The persons who entered came into the hall after passing through the picket line and of necessity were tense because of the activity on the outside. Some of the persons who entered the meeting place were Jews. Others were Gentiles who were opposed to the principles of the organization. The speaker was aware of that because he opened his address by directing insulting remarks at them. In this tense atmosphere, charged with dangerous potentialities, the defendant should have exercised the utmost restraint in an attempt to calm the audience. To the contrary, he deliberately and designedly set about to add fuel to the mounting fire in an effort to raise the emotions of the audience to the boiling point. This he well succeeded in doing, as testified to by those witnesses who were believed by the jury.

Reasonable minds cannot disagree that the defendant was guilty of acts tending to breach and actually breaching the public peace. His conviction by the jury was more than understandable. Any other result would have been a clear miscarriage of justice.

## Conclusion.

The Supreme Court of Illinois significantly points out (400 Ill. 34) that

"In cases of which the present cause is typical, it is customary to inject the issue of freedom of speech so as to create the false impression that great constitu-

> tional questions are involved and sacred constitutional rights are jeopardized."

That court clearly recognized that the only real question here

> "resolves itself into whether the conduct and utterances of defendant constituted a breach of the public peace or a diversion tending to a breach of the public order and tranquility."

Stripped of defendant's attempt to cloak his vituperative utterances in the mantle of the Federal Constitution, it plainly appears that the facts have been found against him by a jury and affirmed by the Appellate Court of Illinois; that under the laws of Illinois, the facts so found are conclusive and binding upon the Supreme Court of Illinois; that the Supreme Court of Illinois has found as a matter of law that the defendant was guilty and that no constitutional right has been violated.

We respectfully submit that defendant has failed to show any impairment of any right under the First or Fourteenth Amendments. On the contrary, we have demonstrated that the decisions of this Honorable Court amply justify affirming the defendant's conviction.

The judgment appealed from should be affirmed.

Respectfully submitted,

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